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IN THE

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October Term, 1956.

No. [redacted] 156

CONSTANCE A. STOPPER,

Petitioner,

v.

THE MANHATTAN INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF IN RE PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

October Term, 1956

No. 1049

CONSTANCE A. STOPPER,

Petitioner,

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF IN RE PETITION FOR WRIT OF CERTIORARI.

(a) Respondent's Reference to "Notorious Tobyhanna Signal Corps Project" Is Irrelevant and Scandalous.

The respondent, in its brief (page 3), has scandalized the decedent's participation in the "Tobyhanna Signal Corps Project" a matter which is not only outside the record but concerning which charges were made after the trial. The fact that the respondent introduced this subject indicates its belief that the Court of Appeals must have been influenced thereby. These charges were aired publicly shortly before the delayed decision of the Court of Appeals.

It is necessary for petitioner to point out that the work began on the Tobyhanna project after Stopper's death, at

which time the plans were not completed. It is also important that Stopper is dead and cannot defend himself, against defendant's innuendoes.

Petitioner's counsel is well acquainted with Stopper's reputation, personal and professional. Stopper (65 years old) had a long and honorable career as an architect in the Philadelphia area. During his career he undertook many important projects and performed them with skill and integrity. His professional ability and personal integrity were never before questioned.

It was this excellent reputation on both counts that impelled Gilboy and O'Malley, two younger men, to seek Stopper for their partnership in handling the architectural and engineering work on the Tobyhanna project. Not only is it clear that the partnership would not have obtained the Tobyhanna contract without Stopper but, from counsel's personal knowledge of the man, it is equally clear that none of the charges now publicized would have occurred, if Stopper had remained alive.

There is something immoral in the aspersions cast upon a dead man's reputation by the respondent, in an attempt to divert the Court's attention from the legal principles involved.

The references to the Tobyhanna project made by the respondent are irrelevant, impertinent and scandalous. They deserve no consideration except censure.

(b) The Petitioner's Raising of the Constitutional Question in the Petition for Rehearing Was Timely.

The respondent contends that the petitioner was too late in asserting the Court of Appeal's violation of the Seventh Amendment in the petition for rehearing.

In all the cases cited by the respondent in support of this principle, a petitioner's constitutional privileges had been violated by the lower court. Of course, in such in-

stances the constitutional question had to be raised on appeal. Thus, if the lower court in the instant case had directed a verdict for the respondent, then the petitioner would have had to include the constitutional question upon the appeal. But the petitioner's constitutional rights were denied for the first time when the Court of Appeals, in violation of the Seventh Amendment, re-examined the facts already determined by the jury.

The controlling cases are not those cited by the respondent but those which state the well settled doctrine that when a constitutional privilege is denied for the first time by the ruling made on appeal, the injured party may challenge this ruling upon a motion for re-hearing, and such challenge will be timely.

Missouri v. Gehner, 281 U. S. 313, 320 (1930);
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 678 (1930);
Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 367 (1932).

(c) Respondent Misstated the Facts in the Following Instances:

On page 12 of its brief, respondent stated that Stopper's concealment of an electrocardiogram was fraudulent. The record discloses (page 104a) that Stopper in answer to question 12 of Part 2 of the application states specifically that he had "X-rays and e.c.g. this year".

In answer to petitioner's claim that the Court of Appeals failed to distinguish, as does the Supreme Court of Pennsylvania, between those cases in which the insured concealed the names of one or more of his doctors or hospitalization [*Derr v. Mutual Life Insurance Company of New York*, 351 Pa. 554, 41 A. 2d 542 (1945); *Reeder v. Metropolitan Life Insurance Company*, 340 Pa. 503, 17 A. 2d 879 (1941); *Freedman v. Mutual Life Insurance Company of*

New York, 342 Pa. 404, 21 A. 2d 81 (1941)] * and those cases such as the instant case, in which the name of the doctor and hospitalization were disclosed but the details not fully given (Petition, pages 9-10), the respondent does not deny that the Supreme Court of Pennsylvania has approved directed verdicts in only the first type of case, but deliberately misstates the facts in an attempt to place the instant case in the first group.

Respondent states that "in this case the insured concealed the fact that Dr. Pierson was treating him for heart symptoms". (Respondent's brief, page 15, footnote 8.) This statement completely disregards the facts found by the jury from the evidence, which must be accepted upon this appeal. At the trial Dr. Pierson testified that he never told Stopper he had a heart condition (39a). In addition the trial judge charged the jury that if Stopper knew he had a heart condition and failed to reveal it there should be a verdict for the defendant (94a). Therefore, since the verdict for the plaintiff establishes the fact that Stopper did not know he had a heart condition, there could be no concealment of this condition by the insured.

(d) The Citation of the Case of American Union Life Insurance Co. v. Judge, 191 Pa. 484, 43 Atl. 374 (1899) Is Misleading.

The respondent has cited the above case to the Court of Appeals and to this Court (Respondent's brief, page 17, footnote 10) as authority for the principle that a false answer to the question of pending insurance applications is

* The following quotation from the *Freedman* case on page 13 of respondent's brief highlights the distinction between the two types of cases. It will be noted that the *Freedman* case states

> "Bad faith may be inferred as a matter of law if the insured denies in his answer that *any* physician has been consulted or *any* medical or surgical treatment has been received during the period in inquiry". In the instant case the name of the attending doctor was revealed.

fraudulent per se. The respondent fails to mention that the *Judge* case involved an insurance policy in which the answers were considered warranties, so that falsity in itself, regardless of bad faith was a complete defense, whereas the instant case requires that false answers must be found to be fraudulent misrepresentations made in bad faith in order to defeat recovery thereon. It will be noted that the *Judge* case was decided in 1899 before the principle of fraudulent misrepresentation was applied to insurance policies in Pennsylvania.

For the reasons above set forth it is clear that the respondent has failed to answer petitioner's argument that there were facts in the record to sustain the finding of the jury that Stopper did not act in bad faith.

Both the Court of Appeals and the respondent have ignored the fact that any evidence of bad faith that could be inferred from Dr. Pierson's record has been explained and contradicted by opposing evidence. Therefore, there was no uncontradicted evidence of bad faith which would allow a directed verdict, but conflicting evidence which had to be decided by a jury.

CONCLUSION.

For the foregoing reasons, the petition for certiorari must be granted.

Respectfully submitted,

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